

Before the
Federal Communications Commission
Washington. D.C. 20554

In the Matter of)
)
1998 Biennial Regulatory Review-) MM Docket No. 98-43.
Streamlining of Mass Media)
Applications, Rules and)
Processes.)

JAN 15 1999

TO: The Commission.

FCC MAIL ROOM

PETITION FOR LEAVE TO FILE PETITION FOR PARTIAL RECONSIDERATION.

Out of an abundance of caution with respect to the Procedures for filing Petitions for Reconsideration, I request LEAVE TO FILE the accompanying PETITION FOR PARTIAL RECONSIDERATION OF REPORT & ORDER FCC 98-281 regarding MM Docket No. 98-43. This Report & Order ("R&O") was Adopted 22 Oct. 1998, and Released 25 Nov. 1998. However, the **full text of the R&O** was not immediately available.

A summary of the complete text of the R&O was published in the Federal Register, Vol. 63, No. 243, on 18 Dec. 1998. I believe the instant PETITION FOR PARTIAL RECONSIDERATION is being filed with the Commission in a timely manner. If however, the Commission considers this submission to be untimely, I seek LEAVE TO FILE the PETITION FOR PARTIAL RECONSIDERATION at this time.

Michael Robert Birdsill

Respectfully submitted,
DATE: 14 JAN 1999

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PETITION FOR PARTIAL RECONSIDERATION OF REPORT & ORDER
FCC 98-281.

The Federal Communications Commission ("FCC") Adopted Report & Order ("R&O") FCC 98-281 on 22 Oct. 1998, and Released the R&O on 25 Nov. 1998. A summary of the full text of FCC 98-281 was published in the Federal Register on 18 Dec. 1998 (Vol. 63, No. 243, Page 70040).

Michael Robert Birdsill ("Birdsill") did file COMMENTS on 16 June 1998, addressing several of the issues contained in the Notice of Proposed Rulemaking for DOCKET No. 98-43. One of those issues-Modifying Construction Permit Extension Procedures- is the subject of this PETITION FOR PARTIAL RECONSIDERATION.

In R&O FCC 98-281, the Commission concluded "that a three-year construction period would provide all permittees an adequate and realistic time to construct". Further, to "amend 47 CFR 73.3598 to provide each permittee with **a total of three unencumbered years** during which it may construct its broadcast facility." (FCC 98-281, Federal Register, 18 Dec. 1998, Paragraph

31. Emphasis added.)

The Commission decided it would "toll" the construction period only when construction is encumbered by an act of God, or when a construction permit is the subject of administrative or judicial review. However, the "tolling" of a Construction Permit with regards to an "administrative review" only applies to "petitions for reconsideration and applications for review within the Commission **of the grant of a construction permit or a permit extension**, and any appeal of any Commission action thereon." (FCC 98-281, Federal Register, 18 Dec. 1998, Paragraph 31. Emphasis added.)

Therefore, the Commission has narrowly acknowledged that a permittee can be "encumbered" by the action of third parties and the procedures of the FCC (Petitions for Reconsideration, Applications for Review, and any other Appeal of those processes). Unfortunately, the Commission has only considered a permittee "encumbered" when these events happen **at the initial grant of a construction permit or a permit extension**.

In his COMMENTS directed towards MM Docket No. 98-43, Birdsill requested that the Commission consider instituting an automatic "administrative extension" during the **initial Construction Period of a Broadcast Construction Permit**. Birdsill advanced the idea in his COMMENTS that this "administrative extension" (tolling?) be restricted to two specific cases, which would achieve a similar goal to the Commission's decision to "toll" construction permits in the case of administrative review-**to provide the permittee with**

three unencumbered years with which to construct its broadcast facility.

CASE # 1: FILING AN APPLICATION TO MODIFY OR ASSIGN/TRANSFER THE CONSTRUCTION PERMIT.

Birdsill proposes that the Construction Permit (CP) be "tolled" while the Commission considers any Application to Modify or Assign/Transfer the CP during the initial construction period (three years). EXAMPLE:

Broadcaster Jones is Granted a CP for an FM Station to serve Littletown, Oregon, on 1 March 1999. Jones has until 1 March 2002 to complete construction of the facility (when the CP automatically expires). Jones proceeds with his business plan to place the FM Station on the air. He negotiates and signs a tower/site lease with the owners of K-COW (TV), who own the tower/site specified in Jones's CP. Jones then closes on the finance package through his bank in order to move forward with ordering his equipment. After checking with his Engineering Consultant, he orders his transmit/studio equipment. On 1 Sept. 2000, the owners of K-COW (TV), after dragging their corporate feet on letting Jones begin transmitter site construction at their tower/site, cancel Jones's lease citing the clause in the lease that states "K-COW (TV) has the right to cancel said lease with Jones's if K-COW (TV) decides to use the tower/site space specified by Jones for the construction of the Digital Television service, K-COW-DT (TV)." Jones now has 18 months before his CP expires.

On 1 Nov. 2000, Jones signs a tower/site lease to co-locate with KORN(FM), Microville, Oregon, on a tower located 5 miles South of the K-COW (TV) tower. On 1 Dec. 2000, Jones files an Application to Modify his CP to specify the KORN(FM) tower site. 14 months remain on the initial construction period of his CP. Jones's Application to Modify is Accepted by the FCC. MacDoll (a third party) files a Petition to Deny Jones's Application, advancing several technical and legal reasons as to why Jones's Application should be denied. Because the FCC will not "toll" Jones's initial Construction Period at this point, as it would have if MacDoll were filing a Motion against the initial Grant of Jones's CP, Jones faces the real possibility that his CP might automatically expire before the FCC deals with MacDoll's Petition to Deny (and the subsequent Appeals that MacDoll plans to file should the Commission rule against him.)

A similar example can be drawn for a permittee filing an Application to Assign/Transfer a CP during the initial Construction Period.

Birdsill proposal is simple-"toll" (automatically extend) a CP during it's initial Construction Period when an Application to Modify or Assign/Transfer is filed at the FCC. Therefore, if an Application to Modify a CP (during the initial Construction Period) is filed with exactly 1 year remaining on the initial Construction Period, once the Application is Granted (and not subject to review at the FCC), the permittee would have 1 year to complete construction before the CP expires.

CASE # 2: FILING A PETITION FOR RULEMAKING THAT DIRECTLY AFFECTS THE CONSTRUCTION PERMIT.

Birdsill proposed that a CP would be "tolled" while the Commission considers a Petition for Rulemaking filed by the Permittee that directly affects the Construction Permit, i.e. Upgrading on a Non-adjacent FM Channel or seeking a Change in the Community of License. EXAMPLE:

Broadcaster Jilly is Granted a Construction Permit for a Class A FM Station in Olde Towne, NY, on 1 June 1999. Subsequently, Jilly is contacted by the Consulting Engineer who prepared the Technical Exhibits for Jilly's Application for her CP. He informs her that there is a good possibility she can upgrade to a Class C3 FM, however she would have to file a Petition for Rulemaking, as the upgrade exists on a Non-adjacent FM Channel. This opportunity exists at this time because another broadcaster has just vacated that FM Channel. Jilly consults with her Communications lawyer, and decides to proceed with the Petition for Rulemaking. Jilly files the Petition for Rulemaking on 1 June 2000 (with 2 years remaining on her

initial Construction Period of her CP). Her Petition for Rulemaking results in the Commission issuing a Notice of Proposed Rulemaking, with Comments and Reply Comments due by 1 June 2001 (Jilly's CP will expire in 1 year). Three (3) parties (plus Jilly) file Comments and Reply Comments. Jilly may have her CP expire before the FCC makes a decision on her Petition for Rulemaking, and the possible Appeals made by the other three parties.

A parallel example can be drawn for a Petition for Rulemaking involving a Change in the Community of License.

Birdsill proposes that at the time a Petition for Rulemaking is filed that directly affects a CP, that the remaining time period of the initial Construction Period be "tolled" (in Jilly's case it would be two (2) years as she filed her Petition on 1 June 2000, and her CP was set to expire on 1 June 2002). In the example above, if Jilly is granted the right to upgrade to a Class C3 Channel and her Application to Modify her CP to specify the new FM Channel, Class, and Power level (ERP) is Granted (and not subject to FCC review), Jilly would have two (2) years to complete the construction of her upgraded FM Station.

CONCLUSION.

A stated goal of the Commission via R&O FCC 98-281 regarding "Modifying Construction Permit Extension Procedures" is "to provide each permittee with **a total of three unencumbered years** during which it may construct its broadcast facility." Birdsill, in filing this PETITION FOR PARTIAL RECONSIDERATION, shares that goal by requesting that the Commission "toll" the initial

Construction Period in the two specific instances cited within this PETITION: The Filing of an Application to Modify or Assign/Transfer a Construction Permit and the Filing of a Petition for Rulemaking that directly affects a Construction Permit. To Accept and Codify Birdsill proposals is only fair in light of the Commission statement that " No additional time will be granted when the permittee has had, **in all, at least three unencumbered years to construct.**" (FCC 98-281, Federal Register, 18 Dec. 1998, Paragraph 34. Emphasis added.)

Respectfully submitted,



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DATE: 14 JAN 1999